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No. 92-1546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITIONER

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April 22, 1993

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 37 of the Rules of this Court, for leave to file the attached brief as amicus curiae in support of the petition for a writ of certiorari. The Association has sought the consent of all the parties to this action, and the consent of the United States

has been received. It is attached hereto. The Respondents have declined to consent.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the largest national trade and professional association of the United States' commercial banks. Assets of ABA member banks are approximately ninety percent of the industry total. Association members are located in each of the fifty states and the District of Columbia, and include both national banks and banks chartered by their respective states.

Approximately 3500 bank trust departments provide fiduciary services for their customers. These services consist of estate and trust administration, the filing of fiduciary and trust tax returns as well as other essential tasks in the estate and gift tax area.

In ABA's member banks there are considerable numbers of pre-1932 trusts under corporate fiduciary management which hold billions of dollars in assets.

As administrators of these and other trusts, it is essential that the banks be able to determine whether a contingent remainderman of a pre-1932 trust, who has made a disclaimer of his or her interest in the trust, has made a transfer subject to gift tax. As financial planners for bank clients it is essential that banks know definitively what steps an individual must take and the time frames involved, in order to make a valid disclaimer of that client's interests in a trust without incurring federal gift tax liability.

A split between the circuits clearly exists with respect to the issue of whether the federal gift tax regulations in effect at the time of the disclaimer

apply to the disclaimer of a remainder interest in a trust when the trust was created before the federal gift tax was enacted in 1932.

This conflict places bank trust fiduciaries, no matter which position they take in regard to disclaimers of pre-1932 trusts, in a situation where their actions in the many jurisdictions in which they do business may be decided at some future date to be adjudged wrong and leave them open to an action for surcharge.

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as amicus curiae in support of the petition for a writ of certiorari.

Respectfully submitted,

/s/ JOHN J. GILL III
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BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

The American Bankers Association hereby respectfully submits its brief as amicus curiae in support of the Petition for Certiorari in accordance with the provisions of Rule 37.2 of the Supreme Court Rules.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the largest national trade and professional association of the United States' commercial banks.

In ABA's member banks there are considerable numbers of pre-1932 trusts under corporate fiduciary management which hold billions of dollars in assets. These numbers suggest that there are thousands of contingent remaindermen who, under the rule enunciated in *Irvine*, may still make a valid disclaimer under state law and who may choose to disclaim their interests in such trusts to avoid any gift tax consequences.

As administrators of these trusts, it is essential that banks be able to determine whether a contingent remainderman of a pre-1932 trust has made an effective disclaimer of his or her interest in the trust or has made a transfer subject to gift tax. As financial planners for bank clients, it is essential that banks know definitively what steps an individual must take and the time frames involved, in order to make a valid disclaimer of that client's interests in a trust without incurring federal gift tax liability.

A split between the circuits clearly exists with respect to the issue of whether the federal gift tax regulations in effect at the time of the disclaimer apply to the disclaimer of a remainder interest in a trust when the trust was created before the federal gift tax was enacted in 1932.

Under the rule enunciated by the Eighth Circuit in *Irvine*, a remainderman of a trust created prior to the Gift Tax Act of 1932 need comply only with state law to perfect an effective disclaimer for federal gift tax purposes. *Irvine v. United States*, 981 F.2d 991, 996 (8th Cir. 1992). On the other hand, the Eleventh Circuit in *Ordway v. United States*, 908 F.2d 890, 895 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991), holds that a 1958 Regulation, which was in effect

when the disclaimer was made, applies to the disclaimer of all interests, including interests held in trusts created prior to 1932.

As the *Ordway* and *Irvine* cases are virtually identical in facts, there is now a split in the Circuits with respect to the requirements of a valid disclaimer for trusts created before the establishment of the federal gift tax system. Such confusion in the law is disruptive to our member banks both in their positions as administrators of trusts and as advisers in the estate planning process. This conflict places bank trust fiduciaries, no matter which position they take in regards to disclaimers of pre-1932 trusts, in a situation where their actions in the many jurisdictions in which they do business may be decided at some future date to be adjudged wrong and leave them open to an action for surcharge.

It is to protect the present and future conduct of bank trust departments in connection with disclaimers of interests in pre-1932 trusts that the American Bankers Association respectfully appears in this case in order to urge the Court to grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

A key ingredient in the estate and gift tax planning process is the ability of estate planners to advise clients of the tax consequences of their proposed actions. This is particularly true for those individuals who are the beneficiaries of trusts which have been established in the past.

Many of the trusts for which ABA members are corporate fiduciaries were established before 1932. Of these trusts there are, according to the Petitioner,

"a significant number of individuals who have remainder interests. . . ." Pet. at 11 Due to the conflict between the circuits on the question of the tax treatment of certain disclaimers, bank trust departments that operate in many jurisdictions outside of the Eleventh and Eighth circuits are placed in an untenable position. How do they advise their clients in a vital part of the estate planning process?

Clients demand certainty which the banks cannot provide. If the banks advise clients according to the *Irvine* decision to disclaim their interests in pre-1932 trusts in accordance with state law, the banks may find that their advice has been adjudged incorrect sometime in the future, which will put them in a position where they are potentially liable for an action for surcharge. Bogert, *Trusts & Trustees* Rev. 2nd Ed. (1982), Section 862. By the same token, if banks advise clients that *Ordway* is the law, and that advice turns out to be deemed inaccurate, the same potential liability for surcharge exists.

As ABA members have billions of dollars of assets held in these trusts, the potential liability can be enormous.

The importance of predictability and uniformity to Congress in regards to disclaimers is shown by the enactment of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1846 which established a single set of definitive rules for disclaimers for purposes of estate, gift and generation-skipping transfer taxes. Before the Tax Reform Act of 1976 was enacted, only local law provided the rules governing the tax consequences of an effective disclaimer.

Beyond the subject of disclaimers is the question of the true definition of the term "taxable transfer."

Section 25.2511-(c)(2) clearly states that its requirements regarding disclaimers only pertain to "taxable transfers." A definition of "taxable transfer" appears in Section 25.2518-2(c)(3) which states that "with respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." This definition does not answer the question of whether a "taxable transfer" occurs if the transfer were never subject to a gift tax due to the fact that it occurred before a federal gift tax system was in existence.

This question regarding "taxable transfers" which has been answered in a different fashion by both the Eleventh Circuit and the Eighth Circuit[1] goes beyond the subject of disclaimers. Resolution of these differing viewpoints is essential in order to provide certainty to bank clients in the estate planning area and also to provide certainty for the banks themselves in the administration of trusts.

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[1] *Compare Irvine*, 981 F.2d at 995 with *Ordway*, 908 F.2d at 895.

CONCLUSION

The Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

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